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No. 91-2061

In the Supreme Court of the United States

OCTOBER TERM, 1992

ARTHUR D. JACOBS, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in deciding the merits of petitioner's claim that the Civil Liberties Act of 1988 is unconstitutional.

2. Whether the Civil Liberties Act of 1988 violates the equal protection component of the Fifth Amendment Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 959 F.2d 313. The opinion of the district court (Pet. App. 19a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1992. The petition for a writ of certiorari was filed on June 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1942, following Japan's attack on Pearl Harbor, President Roosevelt issued Exec.

Order No. 9066, 3 C.F.R. 1092 (1938-1943 comp.). That order authorized the Secretary of War to send persons of Japanese ancestry living in the continental United States to internment camps. Pet. App. 2a. Approximately 120,000 persons of Japanese ancestry were ultimately detained in these camps. H.R. Rep. No. 278, 100th Cong., 1st Sess. 7 (1987).

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians and directed it to review the circumstances surrounding Exec. Order No. 9066. 50 U.S.C. App. 1981 note §§ 3 and 4. After reviewing hundreds of thousands of documents and hearing testimony from over 750 witnesses, the Commission issued a report to Congress in 1982 entitled *Personal Justice Denied.* Pet. App. 4a. That Report detailed evidence that Executive Order No. 9066 and the military orders affecting persons of Japanese ancestry were the products of prejudice and demagoguery rather than military necessity. *Ibid.* The Commission found that persons of German ancestry were treated much differently from persons of Japanese ancestry. *Ibid.* In particular, the Commission found that no mass internment was ordered against persons of German ancestry; actions against such persons were much more selective and individualized. *Ibid.*

In August 1988 Congress responded to the Commission's findings by enacting the Civil Liberties Act of 1988. Recognizing that a "grave injustice" was done to persons of Japanese ancestry by their forced relocation and internment, Congress issued an apology and authorized an award of $20,000 to each internee. 50 U.S.C. App. 1989a, 1989b-4. In taking this remedial action, Congress expressly found that the mass internment of persons of Japanese ancestry was "motivated largely by racial prejudice, wartime

hysteria, and a failure of political leadership." 50 U.S.C. App. 1989a(a). Throughout the debates on this legislation, members of Congress repeatedly noted that no similar program of mass internment had been directed against persons of German ancestry. Pet. App. 16a-17a.

2. In March 1989, petitioner filed suit against the Attorney General of the United States and the Secretary of the Treasury. Pet. App. 5a. He alleged that he was sent to an internment camp as a result of his father's internment. *Id.* at 2a. He further alleged that persons of Japanese ancestry also stayed at this camp and that he was treated no differently from them. *Id.* at 3a. Because the Civil Liberties Act of 1988 provides compensation and an apology to persons of Japanese ancestry but not to persons of German ancestry, petitioner alleged, it discriminates on the basis of race in violation of the Fifth Amendment. Pet. App. 5a. It is undisputed, however, that petitioner's father was interned after an individualized determination concerning his loyalty and not as the result of the kind of mass relocation policy directed against persons of Japanese ancestry. *Id.* at 3a.

The United States moved to dismiss petitioner's complaint for lack of standing and for failure to state a claim upon which relief could be granted. In January 1981, the district court ruled that petitioner lacked standing. Pet. App. 5a-6a. The court explained that while petitioner had alleged that he was interned, he had not alleged that he was interned for the same impermissible reasons as persons of Japanese ancestry. *Ibid.*

The court of appeals disagreed with the district court's ruling on standing, concluding that the court had "confused standing questions with defenses on the merits." Pet. App. 6a. It held that petitioner's

allegation that he was interned was sufficient to establish his standing; he was not required to show that he was interned for the same reasons as persons of Japanese ancestry. *Ibid.* In the court's view, "[e]vidence that the reasons were, in fact, radically different—that Japanese children, for example, were interned because of virulent racial prejudice while [petitioner] was interned after his father received an individualized hearing—is a defense on the merits, not a bar to standing." *Id.* at 6a-7a.

After noting that the district court had not reached the merits of petitioner's claim, the court agreed with the United States that the issue could be resolved without the necessity of a remand. Pet. App. 8a-10a. Although petitioner sought further discovery to determine whether persons of German ancestry were interned for reasons of prejudice, the court observed that Congress had already thoroughly considered this issue and concluded, on the basis of overwhelming historical evidence, that they were not. *Id.* at 9a, 13a-17a. The court therefore concluded that "further discovery on a scrupulously reported historical question would [not] cast any useful light on the case." *Id.* at 9a.

Applying both intermediate scrutiny and strict scrutiny, the court upheld the constitutionality of the Civil Liberties Act. Pet. App. 10a-17a. The court explained that the goal of the Act—to compensate persons who were interned because of racial prejudice—was both important and compelling. *Id.* at 12a. And since persons of Japanese ancestry were interned because of racial prejudice while persons of German ancestry were not, limiting the remedy to persons of Japanese ancestry was both substantially related and narrowly tailored to achieving Congress's remedial goal. *Id.* at 12a-17a.

ARGUMENT

The court of appeals' decision that it could resolve petitioner's claim without the necessity of a remand is consistent with the decisions of this Court and other courts of appeals. Further review on this issue is therefore unwarranted. On the merits, the court of appeals correctly held that the Civil Liberties Act of 1988 is constitutional. As the court of appeals concluded, that statute satisfies the most demanding standard of equal protection review. The petition for a writ of certiorari should therefore be denied.

1. a. Petitioner contends (Pet. 10-11) that the court of appeals did not have authority to decide his constitutional claim because the district court dismissed his complaint for lack of standing and did not reach the merits. According to petitioner, a court of appeals has jurisdiction to decide only those issues resolved by the district court. Petitioner is mistaken. A party is free to defend its judgment, and a court of appeals is free to decide a case against an appellant, "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). See also *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

That principle is fully applicable here. The government sought to dismiss petitioner's complaint in the district court on the merits as well as on standing grounds. Accordingly, even though the district court decided the case in favor of the government on standing grounds alone, the government could defend the judgment, and the court of appeals could decide the case against petitioner, on the alternative ground that his claim lacked merit, because the government had "properly raised" that alternative ground below.

Petitioner argues (Pet. 11-13) that the court of appeals did not affirm the district court's judgment on an alternative ground. Instead, petitioner contends, the court modified the judgment from a dismissal on standing grounds to a final adjudication on the merits, something it could not do absent a cross-appeal. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985) (absent cross-petition, party cannot make an argument that would result in a modification of the judgment). But the court of appeals did not modify the judgment—the judgment was and remains a judgment for the government. It is only the ground of that judgment that has changed—from a judgment for the government on standing grounds to a judgment for the government on the merits. Thus, the court of appeals' decision to address the merits of petitioner's claim reflects a routine application of the alternative ground rule. See *In re Independent Counsel*, 766 F.2d 70, 75 (2d Cir. 1985) (treating standing and the merits as alternative grounds for affirming a judgment); *Cospito* v. *Heckler*, 742 F.2d 72, 78 n.8 (3d Cir. 1984) (same), cert. denied, 471 U.S. 1131 (1985); *Koniag, Inc., Uyak* v. *Andrus*, 580 F.2d 601, 605 n.3 (D.C. Cir.) (same), cert. denied, 439 U.S. 1052 (1978).

b. Petitioner also contends (Pet. 13-15) that the court of appeals should have remanded the case so that he could undertake discovery. When petitioner's counsel was questioned at argument about what she wished to learn through discovery, however, her only suggestion was that she might find evidence that government officials said: "We don't like the Germans; let's gather them up and let's lock them up like we are doing the Japanese." Pet. App. 8a-9a. The court of appeals properly concluded that discovery directed to that issue was unnecessary.

As the court of appeals observed, after thoroughly considering this issue, Congress determined that persons of German ancestry were not subjected to the same kind of racially biased treatment as persons of Japanese ancestry. That determination is entitled to deference from a court. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (Congress's findings entitled to deference); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964) (court must defer to legislative findings that are rational in light of the evidence before Congress).

The evidence before Congress on this question was "hardly controversial." Pet. App. 14a. As detailed by the Commission on Wartime Relocation and Internment of Civilians in its report to Congress, no government official ever seriously proposed the mass relocation of persons of German ancestry. *Id.* at 14a-15a. General DeWitt pressed for the removal of certain categories of persons of German ancestry from the West Coast. *Id.* at 15a. But President Roosevelt rejected even this limited proposal because of widespread political opposition to it. *Ibid.* And while military commanders excluded a small number of persons of German ancestry from certain areas, these individual exclusion orders were based on a review of that person's record. *Ibid.*

In short, the court of appeals soundly concluded that further discovery on this "scrupulously reported historical question" would not "cast any useful light on the case." Pet. App. 9a. Petitioner has failed to demonstrate otherwise.

2. Petitioner argues (Pet. 15-18) that the Civil Liberties Act of 1988 is unconstitutional. That argument is insubstantial. In enacting the Civil Liberties Act of 1988, Congress was seeking to compensate persons who had been relocated or interned during World War II because of racial prejudice. This interest in

remedying past discrimination unquestionably is compelling. *United States* v. *Paradise*, 480 U.S. 149, 167 (1987). Moreover, because persons of Japanese ancestry were relocated and interned because of racial prejudice, while persons of German ancestry were not, Congress's decision to limit its remedial efforts to person of Japanese ancestry is narrowly tailored to achieve its remedial purpose. Put simply, Congress chose to limit its apology and award of monetary compensation to the actual victims of past discrimination. Because the Civil Liberties Act of 1988 satisfies the strict scrutiny test that racial classifications be narrowly tailored to further a compelling interest, it *a fortiori* meets the less exacting standard set forth in *Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997, 3008-3009 (1990).*

* Petitioner also challenged the Aleutian and Pribilof Islands Restitution Act, which authorizes an award of compensation to Aleuts who were relocated during World War II. 50 U.S.C. App. 1989c, 1989c-5. Because petitioner did not allege that his relocation and internment experience was in any way similar to that of the Aleuts, neither the district court nor the court of appeals addressed this claim. Pet. App. 17a-18a. While petitioner discusses this claim in his petition, he does not contend that the lower courts erred in failing to address it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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